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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VIRGINIA MENDEZ et al.,

Plaintiffs and Respondents,

v.

CHAROB LLC et al.,

Defendants and Appellants.

B207701

(Los Angeles County
Super. Ct. No. BC363405)

APPEAL from an order of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed with directions.

Procter, Slaughter & Reagan, James N. Procter II and Gabriele M. Lashly for Defendants and Appellants.

No appearance for Plaintiffs and Respondents.

Charob, LLC and Millennium Property Management, Inc. (appellants) appeal from an order denying them attorney fees. We find no error and affirm the order. We also remand the case to the trial court to enter a judgment of dismissal nunc pro tunc.

FACTUAL AND PROCEDURAL BACKGROUND

Virginia Mendez lived in an apartment at Gramercy Drive with her minor son, Henry Alvarez. During her tenancy at Gramercy Drive, Mendez entered into three leases, each with Bruce Bernard, and each containing an identical attorney fee provision. Under that provision: “If any legal action or proceeding be brought by either party to enforce any part of this Agreement, the prevailing party shall recover, in addition to all other relief, reasonable costs, including attorney’s fees, whether or not the action proceeds to judgment.”

On March 23, 2006, there was a fire in Mendez’s apartment. On December 14, 2006, Mendez and Alvarez (respondents) sued Charob LLC (Charob) and Millennium Property Management, Inc., (Millennium) alleging causes of action based on damages arising out of the fire. Specifically, they alleged causes of action for breach of the covenant of quiet enjoyment, breach of the implied warranty of habitability, negligence, violations of the Los Angeles rent stabilization ordinance, and violation of Business and Professions Code section 17200.

On November 28, 2007, respondents filed a request for dismissal without prejudice, and the clerk entered the dismissal the same day. Subsequently, Charob and Millennium sought costs and attorney fees. Mendez did not object to the request for costs. The court ordered respondents to pay costs but denied Charob and Millennium’s request for attorney fees. This appeal followed.

DISCUSSION

1. *The Case Must Be Remanded for the Trial Court to Enter Judgment*

Respondents' voluntary dismissal was effective when entered in the clerk's register. (Code Civ. Proc., § 581, subd. (d).) Entry of the dismissal, however, was not equivalent to entry of judgment. (*MacLeod v. Tribune Publishing Co.* (1958) 157 Cal.App.2d 665, 668.) Appellants submitted a proposed judgment. (See *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 426, fn. 2 [“Apparently, the memorandum of costs must be filed together with a proposed judgment of dismissal”].) But, the record contains no signed judgment or order of dismissal. (See Code Civ. Proc., § 581, subd. (d) [written and signed order of dismissal constitutes judgment].) We order the trial court to make nunc pro tunc entry of the judgment.¹ (*Coe v. City of Los Angeles* (1994) 24 Cal.App.4th 88, 91, fn. 3 [ordering trial court to enter judgment nunc pro tunc where there is no signed order of dismissal].)

2. *The Court Correctly Denied Appellants' Motion for Attorney Fees*

When a case is voluntarily dismissed, there is no prevailing party for purposes of any action on a contract. (Civ. Code, § 1717, subds. (a) & (b)(2).)² Relying on *Santisas v. Goodin* (1998) 17 Cal.4th 599 (*Santisas*), appellants argue that they could recover attorney fees for defending against the *torts* alleged in respondents' complaint. In *Santisas*, our high court concluded that the prevailing

¹ This case is distinguishable from *Boonyarit v. Payless Shoesource, Inc.* (2006) 145 Cal.App.4th 1188, in which we found an award of costs improper where no order or judgment of dismissal had been entered. Here, the dismissal was entered, respondents did not dispute appellants' entitlement to costs, and appellants filed a proposed judgment.

² Undesignated statutory citations are to the Civil Code.

party may recover attorney fees where that party was a party to a contract containing an attorney fee provision sufficiently broad to include torts. Appellants have failed to show either that they were parties to Mendez's lease or that the attorney fee provision in the lease covers torts.

a. *Appellants Fail to Show That They Were Parties' to the Lease*

“[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.” (*Santisas, supra*, 17 Cal.4th at p. 608.) Appellants have not shown that they were parties to such an agreement. The record contains three leases with identical attorney fee provisions. Each lease was entered into between Bruce Bernard as lessor and Virginia Mendez as lessee. No lease refers to Charob or Millennium and no evidence was presented regarding Bernard's relationship with Charob or Millennium. Thus, Charob and Millennium cannot recover attorney fees.³ (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 786 [defendant who was not a party to a contract was not entitled to recover attorney fees following voluntary dismissal].)

b. *The Attorney Fee Provision in the Lease Does Not Cover Torts*

The narrow attorney fee provision in Mendez's lease differs from the broad attorney fee provision considered in *Santisas*. In *Santisas*, the provision applied to claims “arising out of the execution of [this] agreement.” (*Santisas, supra*, 17 Cal.4th at p. 608.) Here, the attorney fee provision applied only to actions to

³ This issue was raised in respondents' opposition to appellants' motion for attorney fees. In response, appellants stated that Oscar Zepedo, the signatory to the lease, was a representative of defendants. However, they provided no evidentiary support for this proposition and no evidence of the relationship between themselves and Bruce Bernard, the named owner on the lease.

“enforce any part of this Agreement.” (Italics added.) This narrow attorney fee provision is coextensive with Civil Code section 1717, which applies where the contract provided for attorney fees *“incurred to enforce that contract”* (Civ. Code, § 1717, subd. (a), italics added.) Under the same statute, recovery of attorney fees following a voluntary dismissal is barred. (§ 1717, subd. (b)(2) [“Where an action has been voluntarily dismissed . . . there shall be no prevailing party”].)

Appellants cannot show any cause of action asserted in respondent’s complaint that fell within the ambit of the attorney fee provision and was not subject to the bar of section 1717, subdivision (b)(2). To the extent respondents’ causes of action were not designed to enforce the lease, they were not an action to “enforce any part of this Agreement” and therefore fell outside the ambit of the contractual attorney fee provision. To the extent respondents’ causes of action were designed to enforce the lease, the recovery of attorney fees is barred by section 1717, subdivision (b)(2).

There is no meaningful distinction between the narrow provision in this case and the provision ““to . . . enforce any other provision, condition or agreement of this lease”” expressly distinguished in *Santisas*. (*Santisas, supra*, 17 Cal.4th at p. 622, fn. 9.) Both were insufficient to confer a contractual right to recover attorney fees in defense of tort claims. (*Ibid.*) Accordingly, the trial court correctly denied appellants’ request for attorney fees.

DISPOSITION

The order denying attorney fees is affirmed. The case is remanded to the trial court to enter, nunc pro tunc as of March 6, 2008, a judgment dismissing the action.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.